

Are we exclusive? High Court reviews key contractual principles in the context of ‘casual’ commercial relationships (Zymurgorium Ltd v Hammonds of Knutsford plc)

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Commercial analysis: This case relates to a dispute arising in the context of a longstanding commercial arrangement, the terms of which had never been reduced to writing. The court considered whether an overriding agreement had been expressly entered into by the parties, as well as whether a number of terms formed part of the agreement between them, either by implication or subsequent variation. Such terms included an agreement on exclusivity, a duty to act in good faith, and a duty to use best endeavours, among others. The case also explores the requirements for a relational contract by reference to the overriding agreement and a number of Specific Supply Agreements (SSAs), and serves as a useful reminder for parties entering commercial arrangements of the pitfalls of failing to reduce their agreement to writing, particularly in the light of the fallible nature of oral evidence. Written by Mariya Peykova, barrister at 3PB Barristers.

Zymurgorium Ltd v Hammonds of Knutsford plc [\[2021\] EWHC 2295 \(Ch\)](#)

What are the practical implications of this case?

This case highlights the volatile nature of business relationships and the importance of reducing the terms of a commercial relationship to writing. Failure to do so could cause the parties considerable headache if a relationship subsequently deteriorates or develops in a way in which the parties had not originally anticipated. The decision further illustrates the problems which could arise where the parties rely solely or mostly on oral evidence, especially in the light of the well-recognised fallibility of oral evidence in legal proceedings.

Even though a contract may be implied by conduct, the case serves as a reminder of the high threshold that must be met, and particularly the importance of being able to establish a common intention. While the inability to properly discern the exact mechanisms for offer and acceptance will not necessarily be fatal to an argument that a contract has been implied by conduct, the inability to establish a common intention will be. The same principles are applicable to arguments that the terms of a contract have been subsequently varied.

A further point of interest for practitioners and parties in longstanding commercial relationships is the legal position on reasonable notice requirements. It is important to remember that what length of notice is ‘reasonable’ will depend on the facts of each case. Although case law will not be determinative when assessing the length of time which should apply to each individual case, it may be useful to provide the court with a table of cases to show comparisons.

Finally, parties advancing the concept of a relational contract need to be mindful of the factors that the court will have regard to, enunciated in *Bates v Post Office Ltd* [\[2019\] EWHC 606 \(QB\)](#), a case which reflected the basis for imposing good faith obligations as identified by Mr Justice Leggatt (as he then was) in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [\[2013\] EWHC 111 \(QB\)](#). Specifically, where a party is advancing the argument that a contract which was not relational at the outset subsequently became relational, that party will need to go above and beyond simply satisfying the court that the factors set out in *Bates* are present. In particular, the court would need to be satisfied that there is a basis for finding that the contract had been successfully varied to that effect.

What was the background?

The parties in this case had enjoyed a long and fruitful commercial relationship. The terms of their arrangement were not captured in writing. Unfortunately, as is sometimes the case,

the relationship between the parties deteriorated and consequently their business goals were no longer aligned. The claimant, a manufacturer of spirits, brought a claim against the defendant, a specialist drinks wholesaler, for outstanding invoices in relation to products supplied to it by the claimant. In its counterclaim, the defendant alleged a Master Wholesale Agreement (MWA) which it argued had come into existence by express agreement during a meeting in November 2015, in the course of which the parties allegedly agreed to exclusivity. Furthermore, the defendant claimed that the MWA contained the implied terms of good faith and termination by reasonable notice, obligations which the defendant alleged were implied into the agreement (i) at the time the original MWA was entered into, or (ii) in a subsequent variation, and/or (iii) when the agreement became a relational contract due to the nature of the evolving relationship between the parties.

The defendant further argued the existence of a series of oral contracts, termed SSAs in respect of the sale by the claimant of its products to the defendant for supply to a number of specific customers of the defendant. The defendant alleged that each SSA comprised a relational contract, and thus the same terms were implied into the SSAs. In addition, it was contended that a number of the terms were also implied into the SSAs by conduct and/or necessity, including, inter alia, termination by reasonable notice, a duty of good faith, an obligation to use best endeavours, as well as to cooperate with each other, and for the claimant not to supply its products directly to customers who were the subject of an 'active' SSA. The defendant argued that the claimant had repudiated the terms of the MWA and SSAs by trading directly with such customers and sought to off-set its claim for damages against the claimant's claim.

The claimant denied the existence of an MWA and the individual SSAs, as well as that the contracts were 'relational' in nature. Alternatively, the claimant claimed, if the contracts were indeed relational, the defendant was itself in repudiatory breach by developing a range of products which were competitor products to those of the claimant.

What did the court decide?

The court made the following relevant findings:

- there was no express overriding agreement between the parties, nor was there an express agreement as to exclusivity; indeed, it was inconceivable that such exclusivity would have been agreed, particularly since it had not been mentioned in any of the written correspondence between the parties following the meeting in November 2015. There was also some inconsistency in the way in which the defendant had set out its case, which clearly tipped the scale in favour of concluding against the defendant on this point
- a contractual obligation to use best endeavours to produce the necessary goods might theoretically be an adjunct to an arrangement whereby a supplier strives to produce sufficient of its products to meet the demand created by a wholesaler/buyer, but on the facts of this case it was not necessary to imply such a contract, as doing so would offend against the principles in *Heis v MF Global UK Ltd* [\[2016\] EWCA Civ 569](#)
- even if an overriding agreement was found to have existed, the evidence in this case was not conducive to making a finding of contractual variation; the law on formation of contracts (which is also relevant when considering whether there has been a variation of contract) as currently developed, does not go as far as to give contractual effect by way of variation to an existing contract arising from an assumed state of affairs where there is otherwise no evidence of an intention to vary the contract
- by the beginning of 2017 at the latest, the parties had a shared belief that the defendant was the claimant's exclusive distributor. The individual SSAs post-dated this common understanding. Although the precise mechanisms for offer and acceptance were not easy to discern in this case, it was necessary to imply the existence of the SSAs in this case, as well as the relevant terms which were said to have bound the parties, including that the SSAs were terminable upon reasonable notice being given (in this case, 3 months), and that the claimant was to sell products to the relevant customers only through the defendant
- even though in the light of the judge's findings on the SSAs the question of whether the contracts were relational had become academic, the judge concluded that neither the SSAs nor the MWA (had one been found to have existed) were relational in nature

- the claimant had repudiated the SSAs by unilaterally supplying products directly to certain customers, and the repudiation had been accepted by the defendant. It was arguable that the defendant was also in repudiatory breach, but there was no evidence of acceptance by the claimant on the facts

Case details

- Court: England & Wales Chancery Division
- Judge: Judge Pierce (sitting as a High Court judge)
- Date of judgment: 13 August 2021

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